SUPREME COURT, U. S.

FILED

MAY 24 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1352

ROBERT B. J. MULVANEY and MILTON YORMARK,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writs of Certiorari to the Superior Court of New Jersey, Appellate Division

STATE'S BRIEF IN OPPOSITION

JOSEPH P. LORDI,
Essex County Prosecutor,
Attorney for Respondent,
Essex County Courts Building,
Newark, New Jersey 07102

DAVID S. BAIME,
Assistant Prosecutor,
Of Counsel and
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
OPINION	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE GRANT	7
Point I—Petitioner's trial and conviction for the Taylor conspiracy was not in violation of the double jeopardy clause of the Fifth Amendment	7
Point II—Multiple prosecutions were necessary and proper	12
Point III—Evidence relating to the Vesper and Lewis claims was properly admitted and was not barred by the doctrine of collateral estoppel	16
Point IV—Assuming arguendo that petitioner Mulvaney's conviction was in violation of the principles of double jeopardy and collateral estoppel, petitioner Yormark was not prejudiced and lacks standing to raise the issue	23
CONCLUSION	24

Case Cited

Ashe v. Swenson, 397 U. S. 436 (1970)	7, 21
Benton v. Maryland, 395 U. S. 784 (1970)	7
Bluementhal v. United States, 332 U. S. 539 (1947)	8
Bonahan v. Nebraska, 125 U. S. 692 (1887)	2

PAGE

Braverman v. United States, 317 U. S. 49 (1942) 8

Grunewald v. United States, 353 U. S. 391 (1957) 15

Himmelfarb v. United States, 175 F. 2d 924 (9th Cir. 1949) 20

Hoag v. New Jersey, 356 U. S. 464 (1958) 13, 15

Hodges v. State, 85 Ga. App. 617, 70 S. E. 2d 48 (Ct. of App. 1952), certif. denied 209 Ga. 283, 71 S. E. 2d 543, cert. denied 344 U. S. 903 17

Koenigstein v. State, 101 Neb. 229, 162 N. W. 879 (Sup. Ct. 1917) 20

Kotteakos v. United States, 328 U. S. 750 (1945) 8

Krulewitch v. United States, 336 U. S. 440 (1949) 15

Molinaro v. New Jersey, 396 U. S. 365 (1970) 2

Napue v. Illinois, 360 U. S. 204 (1959) 13

North Carolina v. Pierce, 395 U. S. 711 (1969) 7

Palko v. Connecticut, 302 U. S. 319 (1937) 13, 15

People v. Brown, 118 Cal. App. 2d 549, 336 P. 2d 1 (Ct. of App. 1959) 19

People v. Johnson, 328 Mich. 213, 43 N. W. 2d 334 (Sup. Ct. 1950) 18

People v. Massey, 196 Cal. App. 2d 230, 16 Cal. Rptr. 402 (Ct. of App. 1961) 19

People v. Raleigh, 83 Cal. App. 2d 435, 189 P. 2d 70 (Ct. of App. 1962) 19

Pilcher v. State, 14 F. 248 (5th Cir. 1902) 21

Robinson v. State, 40 Ala. App. 101, 108 So. 2d 188 (Ct. of App. 1959) 18

PAGE

Short v. United States, 91 F. 2d 614 (4th Cir. 1937) 8

Smith v. United States, 94 U. S. 597 (1876) 2

State v. Bell, 55 N. J. 239, 260 A. 2d 849 (1970) 7

State v. Continental Purchasing Company, 119 N. J. L. 257, 195 Atl. 827 (S. Ct. 1938), aff'd 121 N. J. L. 76 (E. & A. 1938) 9

State v. Cormier, 46 N. J. 494, 218 A. 2d 138 (1966) 7

State v. Currie, 41 N. J. 531, 197 A. 2d 678 (1964) 7, 15

State v. Ellenstein, 121 N. J. L. 304, 2A 2d 454 (S. Ct. 1938) 9

State v. Profita, 114 N. J. L. 334, 176 Atl. 683 (E. & A. 1934) 9

State v. Varner, 329 S. W. 2d 623 (Sup. Ct. 1959), cert. denied 365 U. S. 803 20

Taylor v. State, 174 Ga. 52, 162 S. E. 504 (Sup. Ct. 1932) 19

United States v. Coplon, 88 F. Supp. 912 (S. D. 1949) 8

United States v. D'Antonio, 362 F. 2d 151 (7th Cir. 1956) 9

United States v. Feinberg, 383 F. 2d 60 (2nd Cir. 1967) 21

United States v. H. E. Koonty Creamery, 257 F. Supp. 295 (D. Md. 1966) 8

United States v. Hutul, 416 F. 2d 607 (7th Cir. 1969) 9

United States v. Kissel, 218 U. S. 601 (1910) 8, 9

PAGE

United States v. Manton, 107 F. 2d 834 (2d Cir. 1939) 9

United States v. Mazochi, 75 F. 2d 497 (2d Cir. 1935) 9

United States v. Palermo, 410 F. 2d 468 (7th Cir. 1969) 8, 9

United States v. Varelli, 407 F. 2d 735 (7th Cir. 1969) 8

United States Constitution Cited

Fifth Amendment 7

Statutes Cited

N.J.S. 2A:98-1 ..... 3, 6

N.J.S. 2A:111-1 ..... 3, 6

Rules Cited

New Jersey Rules of Evidence:

47 5

48 5

55 5

Other Authorities Cited

Underhill's Criminal Evidence (3rd Ed. 1923):

Sec. 629 21

Wharton's Criminal Evidence (1934):

Sec. 48 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

ROBERT B. J. MULVANEY and MILTON YORMARK,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writs of Certiorari to the Superior Court of New Jersey, Appellate Division

STATE'S BRIEF IN OPPOSITION

Opinion

The Orders of the Supreme Court of the State of New Jersey denying certification were without opinion and are printed in 60 N. J. 139, 286 A. 2d 512 (Pa23)* and

* Indicates petitioner's appendix.

60 N. J. 138, 286 A. 2d 511 (Pa24). The opinion of the Appellate Division of the Superior Court of New Jersey affirming the judgment of conviction is printed in 117 N. J. Super. 315, 284 A. 2d 549 (App. Div. 1971) (Pa25 to 51).

Jurisdiction

The State does not question the jurisdiction of this Court to entertain the present applications for writs of certiorari. Nevertheless, it is submitted that this Court should dismiss petitioner Yormark's application since he failed to surrender in accordance with an order issued by the Supreme Court of New Jersey. The State's motions to forfeit bail and for the issuance of a bench warrant were granted by the Essex County Court. The Essex County Grand Jury subsequently returned an indictment charging petitioner Yormak with having unlawfully left the jurisdiction. While the instant matter constitutes "a case or controversy," no persuasive reason exists "why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction." *Molinaro* v. *New Jersey*, 396 U. S. 365, 366 (1970). See also *Bonahan* v. *Nebraska*, 125 U. S. 692 (1887); *Smith* v. *United States*, 94 U. S. 597 (1876). Petitioner, a fugitive from justice, is thus estopped from calling upon "the resources of this Court for determination of his claims." *Molinaro* v. *New Jersey*, *supra*, at 366.

Statement of the Case

Petitioners seek a writ of certiorari to review a decision rendered by the New Jersey Superior Court, Appellate Division, affirming their convictions for conspiracy

to defraud the Maryland Casualty Company. N.J.S. 2A:98-1. Petitioner Yormark also seeks relief from a judgment of conviction for three counts of the substantive offense of conviction for three counts of the substantive offense of obtaining money under false pretenses. N.J.S. 2A:111-1. Following the Appellate Division's affirmance of their convictions, petitioners filed applications for certification to the Supreme Court of New Jersey which were subsequently denied without opinion.

The convictions were based upon three separate indictments returned by the Essex County Grand Jury. A single indictment charged petitioners Yormark and Mulvaney, along with defendants J. L. Brizard and Stanley Perwin, with conspiracy to obtain money under false pretenses and to unlawfully embezzle funds belonging to Maryland Casualty. Vincent Morelli and Albert Albrizio were also named as defendants in that indictment, but charges against the former were dismissed following the trial and Albrizio's case was severed. Two separate indictments charged petitioner Yormark and defendant Perwin with three counts of the substantive crime of obtaining money under false pretenses.

The charges against both petitioners emanated from their participation in a complex scheme to present and prosecute false claims concerning a nonexistent accident with an insured of Maryland Casualty. Anthony Cortese, then a supervisor of Maryland Casualty, and Vincent Morelli, a policyholder, initially discussed the possibility of presenting a false claim long before any of the petitioners became involved. Cortese, whose main concern was to make the Maryland Casualty file appear legitimate, wished to utilize the services of two attorneys in the fraud. Cortese knew that one attorney, Stanley Perwin, would assist him, and asked Morelli if he would be able

to enlist the support of another lawyer to provide medical bills. The main role or function of the attorneys in the conspiracy was to provide medical bills and other legal documents on behalf of the nonexistent claimants.

Morelli began to search for the other attorney by visiting various automobile body shops in the Jersey City area, and asking if anyone knew a lawyer who "would represent some people in an accident that had not yet happened." Morelli was acquainted with a jeweler in Newark named Hy Chuven and asked if he knew of a lawyer who would represent some people in a "phony" accident. Chuven replied that he would "ask around" and took Morelli's unlisted telephone number. That evening or the next day, Morelli received a telephone call from someone who identified himself as Milton Yormark, who stated that he was a friend of Hy Chuven. Yormark said, "I hear you have something for me."

Morelli could not recognize the voice at that time as being that of Milton Yormark. Nevertheless, he specifically told Yormark that he wanted him to represent some claimants in a "phony accident case". He further advised the lawyer that there would be six claimants but that he would represent only three.

Shortly thereafter, Cortese contacted Perwin at the latter's office and asked whether he wished to participate in a "claim [that] was going to be presented against . . . Maryland Casualty . . .". Perwin then agreed to supply medical bills on behalf of three fictitious claimants.

Thus, in the middle of August, all was in readiness. The "Taylor accident" was reported to the insurance company on August 18, 1969. "Medical bills" for the bogus claimants were subsequently submitted by the physicians, Mulvaney and Brizard, to Yormark and Perwin, the at-

torneys of record, and these, in turn, were forwarded to Cortese, the claims supervisor. . Releases were then prepared in blank for each claimant and Cortese issued Maryland Casualty drafts payable to the attorney and the fictitious plaintiffs. Yormark then drew a check on his office trust account payable to each of the claimants, less his fee. These checks were subsequently forged, cashed, and the proceeds shared by Cortese and Morelli. Dr. Mulvaney was paid his "fee" of $300.00, instead of his billed charges of $685.00, by way of check from Perwin.

In addition to the testimony of Cortese and Morelli implicating petitioners, other evidence was introduced to prove that Mulvaney was aware of the fictitious nature of the Taylor claims. This evidence was admitted pursuant to *New Jersey Evidence Rule 55* to rebut Mulvaney's defense that he had been duped.[1] The evidence introduced related to certain claims which Perwin had previously presented against persons insured by Maryland Casualty. Included among these cases were the Joseph Vesper, Willie Lewis and Joseph Mozzocca claims. In all but one of these cases, petitioner Mulvaney was the treating physician and medical bills and reports bearing his signature were ultimately received by the insurance company.[2] In each instance, Cortese issued a Maryland Casualty draft, but Morelli, who played a crucial

---

[1] Rule 55 provides as follows: Subject to Rule 47, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissable to prove his disposition to commit crime or civil wrong on another specified occasion but, subject to Rule 48, such evidence is admissable to prove some fact in issue including motive, intent, plan, knowledge, identity, or absence of mistake or accident.

[2] Another doctor was involved with respect to the Mozzocca claim.

role in the Taylor conspiracy was in no way involved. Unlike the Taylor claim, these cases all involved injuries allegedly sustained in accidental falls. The admission of this evidence was upheld upon review by the Appellate Division and forms one of the bases upon which petitioners' present application is grounded.

At trial, petitioner Mulvaney moved to dismiss the indictment, contending that he was immune from prosecution on the Taylor conspiracy because of a prior acquittal following the trial of a six count indictment charging him and Perwin with separate offenses of obtaining money by false pretenses (N.J.S. 2A:111-1) and with conspiracies to commit such crimes (N.J.S. 2A:98-1). These charges were based on the preparation and filing of three fraudulent accident claims on behalf of three fictitious claimants. The bogus claims were paid to Joseph Vesper for injuries allegedly sustained on October 15, 1966; to Willie Lewis for injuries allegedly sustained on March 3, 1967, and to Joseph Mozzocca for injuries allegedly received on April 19, 1967. Petitioner Mulvaney contended that the State had carved one continuous conspiracy into four separate illegal agreements and that, by reason of the acquittal on the previous indictment, the State was barred from prosecuting the present charges relating to the Taylor conspiracy. Petitioner's motion to dismiss was denied by the trial court upon its finding that the indictment in question charged a separate and distinct conspiracy based on a nonexistent accident which occurred "at a separate time, at a different place and involving different principals."

Petitioners were convicted and all subsequent applications and efforts to obtain a reversal have failed. On March 30, 1972 petitioners' applications for a stay of sentence were denied. Yormark, who did not surrender, remains at large and has been indicted for unlawfully leaving the jurisdiction.

REASONS FOR DENYING THE GRANT

POINT I

Petitioner's trial and convicition for the Taylor conspiracy was not in violation of the double jeopardy clause of the Fifth Amendment.

Petitioners first contend that their unlawful agreement which formed the subject matter of the immediate prosecution was part of a single and continuing conspiracy to submit false claims to Maryland Casualty. More specifically, it is argued that the present prosecution was constitutionally barred by virtue of Mulvaney's prior acquittal. The State submits that each separate agreement had its own distinct illegal objective. Each conspiracy was an end in itself, separate from the others and thus the prohibition of double jeopardy is not applicable.

It is now well settled that the doctrines of double jeopardy and collateral estoppel are binding upon the states as a matter of Federal constitutional law. *Benton* v. *Maryland*, 395 U. S. 784 (1970); *Ashe* v. *Swenson*, 397 U. S. 436 (1970); *North Carolina* v. *Pierce*, 395 U. S. 711 (1969). Accordingly, repeated "prosecution for the same offense after acquittal" is barred by the Fifth and Fourteenth Amendments. *North Carolina* v. *Pierce*, *supra*. New Jersey has long applied these well recognized principles based upon "considerations [of] fairness and fulfillment of reasonable expectations in the light of . . . constitutional goals." *State* v. *Currie*, 41 N. J. 531, 539, 197 A. 2d 678, 680 (1964). See also *State* v. *Bell*, 55 N. J. 239, 260 A. 2d 849 (1970); *State* v. *Cormier*, 46 N. J. 494, 218 A. 2d 138 (1966).

When applying the double jeopardy standard to the law of conspiracy, the court must closely scrutinize the scope of the unlawful agreement. *Kotteakos* v. *United States*, 328 U. S. 750 (1945); *United States* v. *Varelli*, 407 F. 2d 735 (7th Cir. 1969). The test is whether the conspiring parties entertain "a common, continuing objective" embracing a series of criminal acts. *United States* v. *H. E. Koouty Creamery*, 257 F. Supp. 295, 305 (D. Md. 1966). Double jeopardy will act as a bar only where it can be shown that the subsequent prosecution rests solely upon the same agreement that was involved in the former. Where identity of the agreement is established, no matter how variegated the criminal purposes contemplated, the same conspiracy is involved. *Braverman* v. *United States*, 317 U. S. 49, 54 (1942); *United States* v. *Kissel*, 218 U. S. 601 (1910); *Blumenthal* v. *United States*, 332 U. S. 539 (1947); *United States* v. *Palermo*, 410 F. 2d 468 (7th Cir. 1969); *Short* v. *United States*, 91 F. 2d 614 (4th Cir. 1937); *United States* v. *Coplon*, 88 F. Supp. 912 (S. D. 1949).

Where two agreements cannot be tied together to form an all-inclusive combination directed towards the attainment of a single unlawful result, the evidence conclusively establishes multiple conspiracies. The simple showing of a pattern "of separate spokes meeting at a common center" without a "rim" enclosing the "wheel" fails to prove that a series of criminal acts falls within the purview of a single agreement. *Kotteakos* v. *United States, supra*, this court reversed a conviction where separate agreements all involved a single prominent figure. There, it was said that, at most, the proofs disclosed "a succession of separate conspiracies." *Ibid.* Similarly, in *United States* v. *Varelli, supra*, sep-

arate conspiracies were found although both agreements embraced many common participants. And in *United States* v. *D'Antonio*, 362 F. 2d 151 (7th Cir. 1956), the Court of Appeals for the Seventh Circuit held that a conspiracy to counterfeit Series E Bonds was separate and distinct from an unlawful agreement to counterfeit travelers checks despite the "similarity in the subject matter and objectives" of both crimes.

In contrast, the courts have found a single conspiracy to exist where the plot contemplates "bringing to pass a continuous result".[3] *United States* v. *Kissel*, *supra*, at 607. See also *United States* v. *Palermo*, *supra*; *United States* v. *Manton*, 107 F. 2d 834 (2d Cir. 1939); *United States* v. *Mazzochi*, 75 F. 2d 497 (2d Cir. 1935). In *United States* v. *Hutul*, 416 F. 2d 607, 619 (7th Cir. 1969), for example, the Seventh Circuit found that a series of bogus accidents lent credence to the finding that the participants were members of a "sodality of fraud." There, the conspirators defrauded various insurance companies by means of false pretenses and representations. The evidence showed six accident claims filed within a three month period and further disclosed that the desired result was not one accident upon which a claim could be based but a continuing objective of many accidents. Such was clearly not petitioners' objective in the case *sub judice*.

An examination of the records of both trials reveals the patent frivolity of petitioners' argument. At the former trial, the State's proofs disclosed the existence of three

---

[3] The cases in New Jersey are in accord with the general rule. See *State* v. *Ellenstein*, 121 N.J.L. 304, 2A 2d 454 (S.Ct. 1938); *State* v. *Continental Purchasing Company*, 119 N.J.L. 257, 195 Atl. 827 (S.Ct. 1938), aff'd 121 N.J.L. 76 (E & A 1938); *State* v. *Profita*, 114 N.J.L. 334, 176 Atl. 683 (E & A 1934).

separate and distinct agreements. The object or purpose of each conspiracy was to defraud the insurance company with respect to a particular fictitious claim. Anthony Cortese testified that in each instance, he contacted defendant Perwin who, in turn, enlisted the assistance of a physician. Petitioner Mulvaney was involved in two of the three false claims submitted to Maryland Casualty.

Each unlawful agreement was the result of a separate conversation between Cortese and Perwin. Cortese initially contacted Perwin at the latter's office and asked if the attorney would "represent a friend who had been injured" in a fall on premises insured by Maryland Casualty. Perwin agreed to supply medical bills. When Cortese again contacted Perwin, he was advised that petitioner Mulvaney would prepare medical bills and a physician's report. Cortese gave no indication whatever that other false claims were to follow.

Shortly thereafter, Cortese again contacted Perwin and asked if he would represent another "friend" who had fallen on premises insured by Maryland Casualty. Again, Perwin agreed to supply medical bills and Mulvaney was included in this conspiracy for that purpose.

A third claim against Maryland Casualty was eventually submitted by Perwin, this time without Mulvaney's assistance. As in the past, this conspiracy was based upon a telephone conversation between Perwin and Cortese. Substantially, the same pattern of events took place as before.

It is clear that nothing presented at the first trial supports petitioner's argument that there was one agreement and hence one conspiracy. At no time before, during, or after the trial did Mulvaney object to the State's charge that there were three separate conspiracies involved. Nor

was it claimed that the three conspiracies charged in the first indictment comprised, in reality, one unlawful agreement. It was not until the indictment in the instant case was returned and an acquittal in the former trial was obtained that the cry of "one conspiracy" was heard.

The record in the second trial is likewise devoid of evidence revealing a continuing agreement embracing the Taylor as well as the Vesper and Lewis accidents. Here again, Cortese contacted Perwin and asked if he wished to participate in filing a false claim against an insured of Maryland Casualty. Perwin consented and enlisted petitioner Mulvaney's assistance. Vincent Morelli, who was not involved in the Vesper and Lewis frauds, brought Yormark into the unlawful combination and then reported a false accident. In addition, Morelli sent "bodies" to the insurance company doctors for examinations and subsequently assisted in forging the Maryland Casualty drafts which had been issued by Cortese. The Taylor conspiracy was in no way related to the Vesper and Lewis cases and its success or failure was not dependent upon them.

Petitioners have made on showing that they entered into a single agreement to prosecute false claims as to a series of "accidents". Instead, each fictitious "accident" was the result of a separate and distinct agreement and, hence, a separate conspiracy to defraud Maryland Casualty. No single agreement embracing all of the fictitious accidents was ever made or discussed between the common conspirators. The Taylor accident and the six claims prosecuted was planned and agreed upon separately and distinctly from the claims which formed the subject matter of petitioner Mulvaney's first trial. In essence, the planning for each conspiracy contemplated nothing more than the particular bogus accident involved. Under these circumstances, the factual finding of the Appellate Division was proper and fully supported by the record.

POINT II

Multiple prosecutions were necessary and proper.

Petitioner next contends that the State deliberately embarked upon a course of conduct designed to harass and subject him to multiple prosecutions. It is argued that the State intentionally delayed the return of the Taylor indictment until "all evidence in petitioner Mulvaney's first false claims trial had been introduced." (Pb16).

Suffice it to say that petitioner's spurious claim of prosecutorial misconduct is totally without factual support. The Maryland Casualty investigation commenced in January, 1969 and was not completed until some time in late 1970. The investigation related to hundreds of false claims that had been submitted to the insurance company and over thirty indictments were eventually returned. Early in the investigatory stage, a policy decision was made in the Prosecutor's Office to maintain a separate file for each of the numerous bogus claims. As the investigation progressed, it became apparent that each fictitious accident was the product of a separate and distinct conspiracy.

Initially, Cortese and Morelli refused to cooperate, but as the evidence accumulated, both conspirators agreed to testify in return for a promise of immunity from prosecution. Nevertheless, their cooperation came only grudgingly and only after particular claims were found to be fraudulent. In the beginning of September, 1969, it became apparent that Dr. Mulvaney was in some way involved in the Taylor conspiracy. At that time, members of the Prosecutor's Office and counsel for Mulvaney, entered into delicate negotiations relating to a possible grant of immunity in return for a promise by petitioner to tes-

tify against defendant Perwin. These negotiations were still taking place when, on September 8, 1969, the Grand Jury returned indictments against petitioner Yormark and defendant Perwin. Sixteen weeks later, on December 29, 1969, superseding indictments were returned again charging both Perwin and Yormark with obtaining money by false pretenses. Additionally, a single indictment was issued charging Mulvaney and Brizard, along with the attorneys, with having conspired to commit the substantive offenses. By this time, the State was in possession of ample evidence revealing Mulvaney's precise role in the crime charged.

Thus, contrary to petitioner's conclusory assertion, the return of the indictment charging Mulvaney with the Taylor conspiracy was not deliberately delayed. Rather, the time interval resulted from negotiations in which counsel for Mulvaney willingly participated and from the receipt of other evidence which clearly disclosed petitioner's precise role in the conspiracy. The record is barren of any evidence supporting petitioner's theory that the State attempted to "wear the accused out by a multitude of cases with accumulated trials." *Palko* v. *Connecticut*, 302 U. S. 319, 328 (1937). See also *Hoag* v. *New Jersey*, 356 U. S. 464, 467 (1958). Nor has there been a showing of a nefarious plan to suppress or hide evidence to permit its use at a subsequent date in a series of trials relating to a single transaction or a series of related events. *Palko* v. *Connecticut*, *supra*, at 328. Cf. *Napue* v. *Illinois*, 360 U. S. 204 (1959). Clearly, the conduct of the prosecution conformed with fundamental notions of fairness.

The record is similarly devoid of any evidence that the State attempted to subject petitioner to a multitude of separate prosecutions. It is abundantly clear that the indictments against petitioner Mulvaney could not have

been consolidated for a single trial. The State was confronted with three alternatives as to the manner in which the four conspiracies were to be tried:

(1) All four claims could be tried together and all defendants could be joined (including Yormark and Brizard). This method would have the advantage of trying all charges against petitioner Mulvaney and defendant Perwin in one action. However, it was felt that this advantage was outweighed by other factors. Yormark and Brizard could validly claim that the evidence as to Vesper, Mozzocca and Lewis, with which they were not implicated, would prejudice their rights.

(2) All four claims could be tried together as to Perwin and Mulvaney, with Yormark and Brizard being tried separately on the Taylor claim. This method also would have the advantage of trying all charges against Perwin and Mulvaney in one action. However, this advantage was outweighed by the fact that this would necessitate splitting up the Taylor claim conspiracy and duplicating a lengthy trial. This would have wasted the time of the trial court as well as that of the State and the defendants.

(3) The Vesper, Mozzocca and Lewis cases could be tried in one action with Mulvaney and Perwin as co-defendants and the Taylor case could be tried in another action, joining Yormark and Brizard with Mulvaney and Perwin. It was felt that this method would avoid the unacceptable disadvantages of both of the other alternatives. For these reasons, the State opted for the third alternative. The State submits that its decision was the most equitable that could have been made under the circumstances.

This Court has never fashioned a mandatory joinder rule of constitutional dimension. As indicated above, such

a rule would often serve to prejudice persons accused of criminal conduct. The obvious import of *Hoag* v. *New Jersey, supra* and related cases is that a State may not deliberately harass an accused by unreasonably subjecting him to a multitude of prosecutions. The sequence of events here shown to exist clearly discloses that the prosecution's conduct was reasonable and in keeping with this Court's admonition in *Hoag* and *Palko*.

No one "currently questions the great worth of the constitutional safeguard against double jeopardy" since it "justly assures that the State with its great resources will not be permitted to harass and oppress the individual by multiple prosecution or punishment for the same offense." *State* v. *Currie, supra* at 538. Conversely, the joinder of separate and distinct conspiracies in a single prosecution is pregnant with the dangers of undue prejudice for the issues to be resolved become "so vague" as to defy definition. *Krulewitch* v. *United States*, 336 U. S. 440 (1949). "Prior cases in this court have repeatedly warned" that "attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions" will be viewed "with disfavor" *Grunewald* v. *United States*, 353 U. S. 391, 404 (1957). Here, the State fully complied with that admonition and attempted to limit the scope of the issues to be resolved by the jury by presenting a separate prosecution for each distinct agreement. Clearly, petitioners do not have cause to complain since constitutional principles were fully complied with and they received a fair trial.

POINT III

Evidence relating to the Vesper and Lewis claims was properly admitted and was not barred by the doctrine of collateral estoppel.

The State's proof at trial disclosed a complex unlawful conspiracy to submit false claims with regard to a nonexistent accident involving fictitious claimants. In order to execute the conspiratorial objects, it was necessary to enlist the support and active participation of Doctor Mulvaney. His role in the conspiracy was to provide fraudulent medical bills and reports in order to make the claims appear legitimate.

Petitioner did not contend below nor does he argue here that the Taylor accident, in fact, occurred or that the claimants were anything other than fictitious. Throughout the trial and in the appeal below, Doctor Mulvaney maintained the position that he was not a knowing participant in the criminal scheme. It was, thus, incumbent upon the prosecution to prove an evil state of mind.

Despite this obvious fact, petitioner contends that the trial court erred in admitting testimony relating to other similar instances of misconduct which were not embraced in the present indictment. More specifically, it is argued that his prior acquittal with respect to the Vesper and Lewis matters precludes the admission of evidence of other crimes which is otherwise admissible. It is true that a part of the testimony presented on rebuttal concerned events which were the subject of a prior prosecution resulting in an acquittal, but the introduction of such evidence was merely incidental to proof of the main issue. The fact that an accused was tried and acquitted of another offense does not bar the introduction of evidence in a subsequent prosecution to illustrate his state of mind.

The great weight of authority throughout the country clearly supports the State's position. In *Hodges* v. *State*, 85 Ga. App. 617, 70 S. E. 2d 48 (Ct. of App. 1952), *certif.* denied 209 Ga. 283, 71 S. E. 2d 543, *cert.* denied 344 U. S. 903, a single accusation charged defendant with five separate counts of operating an illegal lottery. At the conclusion of the State's proofs, the trial judge dismissed two counts holding that the State had failed to present prima facie cases. Nevertheless, the prosecutor during his summation alluded to much of the evidence which had been presented with respect to the two counts dismissed by the judge, and argued that it could be considered in determining whether defendant was knowlegeable with respect to the crimes charged in the remaining counts. On appeal, defendant argued that his acquittal barred the prosecutor from commenting upon the evidence of other crimes. The Georgia Court of Appeals was not persuaded, however, and held that the prosecutor's comments were proper. The Court went on to say:

> Nor is the contention sound that this evidence should have been ruled out because it relates to other alleged offenses for which this defendant had been previously tried and acquitted. While the defendant had been tried and acquitted of previous alleged offenses, and the verdict of not guilty may have indicated that there was not sufficient evidence to convince the jury beyond a reasonable doubt of his guilt, still the acquittal would not necessarily exclude the evidence, because the evidence may tend to illustrate the acts of the defendant as shown in the transaction for which he is now on trial, and may be considered in connection with later evidence, though of itself insufficient to authorize a verdict of guilty. *Id.* at 50.

Of similar import is the Michigan Supreme Court's decision in *People* v. *Johnson*, 328 Mich. 213, 43 N. W. 2d 334 (Sup. Ct. 1950). There, defendant, a public officer, was convicted of accepting a bribe and appealed claiming that the admission of evidence of other bribes for which he had previously been acquitted was improper. The Court held that the evidence complained of was admissible to prove defendant's unlawful intent. The Court stated:

> The fact the accused was tried and acquitted of the other offense does not bar the introduction of evidence thereof in a prosecution for bribery where such evidence shows the general plan or system of the bribe or illustrates the accused's acts in the transaction on trial, or throws light on the later evidence.
>
> • • •
>
> Defendant is not on trial for the offense charged against him in the prior case. The question presently at issue is whether as charged by the prosecution he accepted a bribe in violation of the statute on which the information is based. Testimony tending legitimately to establish such offense, or some element thereof, may not be excluded solely on the ground that it was offered and received in the prior case as bearing on defendant's guilt of the offense there charged. *Id.* at 340.

For those other state cases supporting the prosecution's position, see *Robinson* v. *State*, 40 Ala. App. 101, 108 So. 2d 188 (Ct. of App. 1959) (defendant found guilty of unlawfully possessing a revolver and appealed upon the ground that evidence of a prior similar criminal charge had been erroneously admitted. The Court held that the

evidence was admissible to prove defendant's guilty intent stating "[W]e are clearly of the opinion that the fact that a defendant in a criminal prosecution has been acquitted of another offense does not render evidence of such prior offense inadmissible if such evidence is otherwise competent"); *People* v. *Massey*, 196 Cal. App. 2d 230, 16 Cal. Rptr. 402 (Ct. of App. 1961) (defendant was indicted and tried for burglary. At this trial the State presented evidence of a subsequent burglary in the same neighborhood to show defendant's identity although there was a prior acquittal with respect to that charge. The Court affirmed the conviction stating, "It is well established, however, that an acquittal does not prevent the admissibility of evidence concerning another wrongful act as conviction of the offense is not a prerequisite to the introduction of such evidence"); *People* v. *Brown*, 118 Cal. App. 2d 549, 336 P. 2d 1 (Ct. of App. 1959) (The State introduced evidence of prior offenses for which defendant had not been convicted. The Court affirmed holding "Conviction of the offense is not always a prerequisite to the introduction of evidence concerning other wrongful acts"); *People* v. *Raleigh*, 83 Cal. App. 2d 435, 189 P. 2d 70 (Ct. of App. 1962) (The State offered evidence of other crimes for which defendant had been acquitted. In affirming defendant's conviction the Court stated "[T]he rule is well settled in England as well as in this country that an acquittal . . . does not prevent the admissibility of the evidence"); *Taylor* v. *State*, 174 Ga. 52, 162 S. E. 504 (Sup. Ct. 1932) (Evidence of other crimes of a similar nature introduced by the State to prove defendant's guilty knowledge. The Court affirmed, stating "Though the defendant may have been tried for violating the law as to one or more of these transactions with other patients and acquitted, the State may, nevertheless, prove the facts connected with them for the

purpose of illustrating the defendant's state of mind as to the transaction at bar"); *Koenigstein* v. *State*, 101 Neb. 229, 162 N. W. 879 (Sup. Ct. 1917) (defendant was tried and found guilty of bribery. At trial, the State introduced evidence of other bribes for which defendant had been previously acquitted. The Court in affirming the conviction opined "at all events it seems that receipt of such evidence cannot be said to put the defendant in jeopardy the second time for the same offense"); *State* v. *Varner*, 329 S. W. 2d 623 (Sup. Ct. 1959), *cert.* denied 365 U. S. 803 (defendant was indicted for murder in the first degree. At trial, evidence of another killing which resulted in defendant's acquittal was introduced to prove defendant's state of mind. The Court affirmed holding that the acquittal in no way barred the introduction of the evidence which was relevant in determining defendant's intent).

In an unbroken line of decisions, the federal courts have consistently held that an acquittal on a prior charge does not bar the introduction of evidence of other crimes. In *Himmelfarb* v. *United States*, 175 F. 2d 924 (9th Cir. 1949), defendant was indicted in four separate counts for willfully failing to report certain income. At the conclusion of the State's proofs the trial judge dismissed two charges. Thereafter, defendant moved to strike all testimony relating to the counts of the indictment that had been dismissed. The Court of Appeals for the Ninth Circuit held that the trial court properly denied defendant's motion. The Court stated that the "evidence was not admitted to show that he committed another crime but merely to show his intent to act willfully, his intention and his state of mind." *Id.* at 941 *cert.* denied 338 U. S. 860.

Similarly, in *Pilcher* v. *State*, 14 F. 248 (5th Cir. 1902), defendant appealed from a judgment of conviction for the unlawful removal and concealment of distilled spirits. At trial the State proved that on the night before the crime defendant broke a lock and entered the warehouse from which the liquor had been removed. Defendant objected upon the ground that he had been indicted for breaking the lock and had been tried and acquitted. The Court affirmed holding that the evidence was properly admitted to show defendant's participation in a plan or scheme, and that the prior acquittal did not bar its introduction.

In *United States* v. *Feinberg*, 383 F. 2d 60 (2nd Cir. 1967), the Court of Appeals for the Second Circuit had occasion to pass upon a similar issue. There, defendant appealed from a judgment of conviction for transporting a stolen automobile in interstate commerce. At trial the State offered evidence indicating defendant's purchase of another automobile from the same illegal source. Defendant objected upon the ground that he had previously been acquitted of that charge. The Court was not persuaded and held that the evidence had been properly admitted. *Id.* at 71.

The above cited decisions indicate an almost universal judgment in jurisdictions throughout the country that an acquittal has no bearing on whether evidence of other crimes may be admitted. See also *Underhill's Criminal Evidence* §629 (3rd Ed. 1923); *Wharton's Criminal Evidence* §48 (1934). An acquittal merely exempts an accused from punishment and from another prosecution. It does not necessarily show that he was innocent.

Ashe v. *Swenson*, *supra*, is not to the contrary. That case merely holds that an issue once litigated may not be the subject of further prosecution. That in no way im-

plies, however, that the State is forever barred from using evidence merely because it was introduced at a former trial which resulted in acquittal. Clearly, such evidence may be admitted at a subsequent date to prove a fact which was never litigated or in dispute at the former trial.

Here, the evidence in question related to petitioner's state of mind, the paramount issue to be resolved by the jury at the second trial. Moreover, such proof disclosed a close relationship between Perwin and Mulvaney which eventually culminated in the unlawful agreement which formed the basis for the immediate prosecution.[4] Under the circumstances, the doctrine of collateral estoppel was in no way violated or, for that matter, even involved. Mulvaney's trial on the Vesper and Lewis conspiracies resulted in an acquittal and those charges were never before the jury at the second trial. The "issue of ultimate fact" relating to the Vesper and Lewis claims was never relitigated. The State was not collaterally estopped from introducing such proof.

---

[4] That is not to say, as petitioner suggests, that a single conspiracy embracing the Vesper, Lewis and Taylor claims existed. Agreement is the gist of the offense of conspiracy. Common conspirators may, as here, participate in several separate and distinct agreements. Nevertheless, the evidence in question tended to show a close working relationship between Perwin and Mulvaney which existed prior to the Taylor conspiracy.

POINT IV

Assuming arguendo that petitioner Mulvaney's conviction was in violation of the principles of double jeopardy and collateral estoppel, petitioner Yormark was not prejudiced and lacks standing to raise the issue.

Petitioner Yormark argues that Mulvaney's conviction was in violation of the principles of double jeopardy and collateral estoppel and that their joint trial served to "contaminate" his defense (Pb20). He claims that evidence against Mulvaney was improperly admitted and served to prejudice him because the trial judge instructed the jury that "declarations and acts of each named co-conspirator could be weighed in assessing the guilt of every conspirator" (Pb20).

It is the State's position that established principles of double jeopardy and collateral estoppel are inapplicable and did not serve to bar Mulvaney's second trial. Even assuming the Mulvaney's conviction was improperly obtained, however, petitioner Yormark cannot claim any benefit arising out of such a constitutional error. Had Yormark been separately tried, the State would have been permitted to introduce evidence relating to Mulvaney and Perwin's complicity in the criminal scheme. Quite obviously, it would have been permissible to offer evidence relating to the nature and scope of the unlawful agreement as well as the manner in which the conspiratorial objectives were to be executed.[5] Thus, the acts and declara-

[5] While it is true that evidence relating to the Vesper and Lewis claims would not have been admissable against Yormark had there been a separate trial, this clearly is of no significance. Here, the trial court instructed the jury that only acts and declarations in furtherance "of the conspiratorial objective could be used as evidence against all co-conspirators. The Vesper and Lewis cases only related to Mulvaney's guilty knowledge and his participation in the conspiracy relating to the Taylor claim. Thus, the jury did not consider such evidence in determining whether Yormark was involved in the Taylor conspiracy.

tions of Mulvaney and Perwin would have been admissible against petitioner Yormark in any event. In fact, assuming that the Vesper, Lewis and Mozzocca claims all emanated from a single unlawful agreement, acts and declarations of Mulvaney and Perwin relating to the prosecution of those cases as well would similarly have been admissible against petitioner Yormark. Clearly, petitioner Yormark was in no way prejudiced and his application for a writ of certiorari should be denied.

CONCLUSION

None of the issues raised in petitioners' application are of such constitutional moment as to require this Court's review. For the aforesaid reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted.

JOSEPH P. LORDI,
Essex County Prosecutor.

DAVID S. BAIME,
Assistant Prosecutor,
Of Counsel and on the Brief.